APPEAL NO. 050557
FILED MAY 2, 2005

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was commenced on January 20, 2005, and concluded on February 28, 2005. With regard to the three disputed issues the hearing officer determined that the Independent Review Organization (IRO) decision is supported by a preponderance of the evidence, that the Texas Workers' Compensation Commission (Commission) Medical Dispute Resolution (MDR) request was timely requested after the August 31, 2004, reconsidered denial by the appellant (carrier) "even though Carrier had denied prior requests," and that there was not a substantial change of condition after March 22, 2004, and before August 12, 2004, when the third and fourth preauthorizations were requested. The hearing officer's determination of no substantial change of condition between the preauthorization requests has not been appealed and has become final. Section 410.169.

The carrier appeals, contending that the hearing officer erroneously interpreted Commission rules and that the rules and preamble the hearing officer cites to support his decision had been clarified and amended. The file does not contain a response from the respondent (claimant).

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that the claimant sustained a compensable (low back) injury on _____. The medical records indicate that the claimant had spinal surgery in the form of "a right L4-5 lumbar decompression on 3-5-98 and a left L4-5 decompression on 8-21-00." The claimant also underwent spinal surgery which included an L4-5 diskectomy with BAK-P cages, iliac autograft and allograft on July 9, 2001. Medical records further indicate that the claimant has continued to have chronic low back pain and leg pain. (Dr. P), the claimant's treating doctor began to suspect that the claimant did not have a stable or solid fusion in 2003 although x-rays and a CT scan indicated otherwise. Dr. P requested preauthorization to perform exploratory spinal surgery of the claimant's fusion on February 18, 2004, which was denied by the carrier's utilization review organization (URO) on February 24, 2004. The URO issued a letter of nonauthorization on March 19, 2004. On March 16, 2004, Dr. P apparently renewed his request or requested reconsideration which was denied by the URO on March 22, 2004. Although Dr. P testified that he continued to appeal or dispute the URO denials, apparently no action was requested from the MDR office.

THE WAIVER ISSUE

Dr. P apparently again requested "lumbar exploration of fusion" and if the fusion was unstable the insertion of pedicle screws in August 2004. The carrier's URO on

August 12, 2004, again recommended nonauthorization noting "the documentation provided does not support a substantial change in the injured workers' condition . . . and therefore this request does not meet the requirements for resubmission pursuant to [Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 134.600(g)(4) (Rule 134.600(g)(4)]." The notice, dated August 13, 2004, was to Dr. P who at sometime in August 2004 resubmitted the request or requested reconsideration which was again denied by the carrier on August 31, 2004, citing Rule 134.600(g)(4). On October 1, 2004, the MDR received Dr. P's request for an IRO review of the proposed surgery. The MDR sent its MR-100 letter, dated October 5, 2004, to the carrier. An IRO decision, dated October 28, 2004, was made in favor of the proposed exploratory surgery. Dr. P testified at the CCH why he believed the exploratory surgery was necessary. The carrier contends that not only is the IRO decision not supported by sufficient evidence but that the Commission does not have jurisdiction to decide the case under Rule 134.600(g)(4).

The hearing officer, in his decision cites Rule 133.308(e), which provides that a person or entity who fails to timely file a request waives the right to independent review or medical dispute resolution. The hearing officer also commented that timeliness is determined in Rule 133.308(e)(2) as :

> (2) A request for prospective necessity dispute resolution shall be considered timely if it is filed with the division no later than the 45th day after the date the carrier denied approval of the party's request for reconsideration of denial of health care that requires preauthorization or concurrent review pursuant to the provisions of § 134.600.

The hearing officer found that the first request was made on or about February 24, 2004, and the last request was denied by the carrier on August 31, 2004, with the MDR request being received by the Commission on October 1, 2004. The hearing officer then comments that the preamble to Rules 133.308 and 134.600 address "this very issue" and quotes from a comment and response to Rule 133.308(e) found at 26 Tex. Reg. 10952 and 10953 dated December 28, 2001. The quoted response was incorporated in Rule 134.600(g)(4) effective January 1, 2003, which states:

> (4) A request for preauthorization for the same health care, that has been denied at the IRO level as not medically necessary, may only be resubmitted when the requestor provides objective documentation of a substantial change in the employee's medical condition.

The hearing officer interprets that rule to mean that the "requirement to show a substantial change in condition applies to requests made to the IRO level, not preauthorization requests made to the Carrier" and therefore concludes that the MDR request was timely because the February/March 2004 requests and denials had not been made to the IRO level.

However, Rule 134.600(g)(4) was amended and clarified effective March 14, 2004. A Comment and Response regarding Rule 134.600(g)(4) states:

> COMMENT: Commenters recommended the rule should be explicit that it is improper for health care providers to resubmit requests that have been denied without documentation of a substantial change in the employee's condition whether or not there has been an IRO review.
>
> RESPONSE: The Commission agrees. Subsection (g)(4) as proposed and adopted clarifies, "a request for preauthorization for the same health care shall only be resubmitted when the requestor provides objective documentation to support that a substantial change in the employee's medical condition has occurred."
> 29 Tex. Reg. 2355 March 5, 2004.

Rule 134.600(g)(4) now reads:

> (4) A request for preauthorization for the same health care shall only be resubmitted when the requestor provides objective documentation to support that a substantial change in the employee's medical condition has occurred. The carrier shall review the documentation and determine if a substantial change in the employee's medical condition has occurred.

The phrase "that has been denied at the IRO level as not medically necessary" has been deleted in the current amended rule. We hold, in this case, that the August 2004 requests for preauthorization for the previously denied exploratory lumbar surgery must show "a substantial change in the employees medical condition has occurred." The hearing officer, in an unappealed conclusion determined that there was not a substantial change of condition after March 22, 2004, and before August 12, 2004. The claimant, not having shown by objective documentation that there had been a substantial change in his medical condition may not resubmit a request for the previously denied preauthorization of the lumbar exploratory surgery. An IRO should not have been appointed.

THE IRO DECISION

As noted in a similar case, Texas Workers' Compensation Commission Appeal No. 042573-s, decided December 6, 2004, had the IRO been properly appointed, there was conflicting medical evidence regarding the necessity of the proposed spinal surgery. The IRO's decision would have been supported by sufficient evidence.

We affirm the hearing officer's determination that the IRO decision is supported by a preponderance of the evidence. We reverse the hearing officer's decision that the MDR request was timely requested after the reconsidered denial and render a new decision that the MDR request was not timely requested after the first denial of the

reconsideration of the preauthorization of March 22, 2004. The carrier is not liable for the proposed spinal surgery exploration requested by Dr. P.

The true corporate name of the insurance carrier is **ZENITH INSURANCE COMPANY** and the name and address of its registered agent for service of process is

JAMES H. MOODY II
901 MAIN STREET
DALLAS, TEXAS 75202.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Margaret L. Turner
Appeals Judge